Filed 12/28/12 In re T.K. CA4/3

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re T.K., a Person Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. CYNTHIA S., Defendant and Appellant.	G046892 (Super. Ct. No. DP019279) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed.

Nicole Williams, under appointment by the Court of Appeal, for Defendant and Appellant.

Nicholas S. Chrisos, County Counsel, Karen L. Christensen and Jeannie Su, Deputy County Counsel, for Plaintiff and Respondent.

No appearance by the Minor.

Cynthia S. appeals from the juvenile court's summary denial of a Welfare and Institutions Code section 388[1] petition, the court's order terminating her parental rights under section 366.26, and the denial of her request for a continuance of the permanency planning hearing (§ 366.26 hearing). We affirm.

FACTS

On December 30, 2009, the Orange County Social Services Agency (SSA) filed a juvenile dependency petition alleging parental neglect after Cynthia's baby, T.K., was born with a positive toxicology screen for methamphetamine. Both parents have criminal records. T.K.'s presumed father, C.K., had felony convictions for burglary, receiving stolen property and narcotics possession.[2] Cynthia had been convicted of misdemeanor driving under the influence of alcohol or drugs approximately two years before T.K.'s birth.

In January 2010, T.K. was placed in the home of his paternal grandmother. In February, the juvenile court accepted the parents no contest plea to the allegations of parental neglect contained in the petition. In March, the court declared T.K. a dependent child of the juvenile court and approved a case plan that required Cynthia to stay away from drugs and alcohol, complete a parenting class, a drug treatment program, submit to random drug testing, and attend Narcotics Anonymous (NA) and Alcoholics Anonymous (AA) meetings. Cynthia enrolled in the Dependency Drug Court program and agreed to fully participate in substance abuse treatment and counseling as required by the program. The court ordered unmonitored visitation while T.K. was hospitalized, and regular, monitored visitation when the child was placed with his paternal grandmother.

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1 All further statutory references are to the Welfare and Institutions Code.

2 The presumed father voluntarily relinquished his parental rights and he is not a party to this appeal.

Cynthia initially followed the case plan. However, in April, she was discharged from the Dependency Drug Court program because of "several incidents involving lying, falsifying her Court 12 step cards, and not showing up to previous Court appearances." She was discharged from the perinatal drug treatment program in June 2010. The program allowed her to reenroll in August, but she failed to provide NA and AA attendance records and had positive drug tests. Consequently, the court extended jurisdiction after the six-month review hearing.

Cynthia repeated this pattern, i.e., brief periods of compliance with the case plan mixed with longer periods of noncompliance, during subsequent review periods. Cynthia regularly visited T.K., although she never progressed to unmonitored visits, nor did she ever care for T.K. overnight. In June 2011, after 18 months of family reunification services, the juvenile court ordered a section 366.26 hearing.

T.K. was placed with a prospective adoptive home in August 2011. In October, Cynthia filed a motion to continue the section 366.26 hearing and for the appointment of a bonding expert. The court continued the proceedings, and in November, Cynthia filed a section 388 petition based on changed circumstances.

According to the section 388 petition, Cynthia sought immediate custody of T.K., additional reunification services, and liberalized visitation, which she stated should include overnight visits and unmonitored visits. She submitted several letters of recommendation from family and friends, a certificate of completion for the perinatal program, and attendance cards for AA meetings in support of her petition.

The court denied the petition without a hearing, concluding Cynthia had failed to make a prima facie showing of changed circumstances. The court noted, "This mother at this point is attempting to change [her] circumstances. That appears to be clear; however, without sounding trite, too little too late. It's long past the point in time when she should have gotten it together, and there should not have been shown anything except negative tests for drugs." The court also denied Cynthia's request for a bonding

study, noting, "there was plenty of time to make this request in a timely fashion long before this point," and Cynthia failed to demonstrate a bonding study was in T.K.'s best interest.

The permanency planning hearing began on November 17, 2011. The social worker reported T.K. was doing well in his prospective adoptive parent's home. As for Cynthia, the social worker reported that she had been initially given 10 hours of visitation every week, but that had been reduced to six hours per week after some positive drug tests. She had missed few scheduled visits, although her visits were not without conflict with T.K.'s prospective adoptive mother. Cynthia's progress with the rest of the case plan was minimal. She had trouble addressing the underlying substance abuse issue as demonstrated by her positive drug tests and intermittent compliance with drug treatment programs.

Cynthia testified she had a good relationship with T.K. in that he would smile and run to her, play with her, and remember words from songs they sang together. She claimed T.K. accepted directions from her, and that she was very attentive to his needs. Cynthia's mother and father, the maternal grandparents of T.K., also testified to the close bond between Cynthia and T.K. that they had witnessed whenever T.K. and Cynthia were together at their house, which included scheduled and a number of previously unreported, impromptu visits. Both of them testified to a dramatic change in Cynthia in the months before the hearing.

After the hearing, the juvenile court reconsidered its ruling on Cynthia's request for a bonding study, stating, "after listening to the testimony . . . and then reviewing with a lot of detail all of the records that were submitted by social services, the court has found that there were substantial dates that you did visit with your child between the dates of February 16th and August 5th. [¶] There were additional visits that have occurred after that, but the substantial time that was, you know, multiple times each week occurred between that time period to the point where the court does feel that you

did have an ongoing contact with your child more than anyone . . . is aware of based on the contacts you had with your mother and father when they took your son over the weekend. [¶] That did add quite a lot of time that we didn't know about. They're probably unauthorized visitations, but at the end of the day, they're visitations nonetheless . . . ."

Dr. Ronald H. Banner conducted a bonding study and filed his report in January 2012. The report stated, in pertinent part, that Cynthia had "many unresolved psychological issues," including a borderline personality disorder that is "characterized by unstable and intense interpersonal relationships, impulsivity, affective instability, inappropriate, intense anger or difficulty controlling anger, and transient, stress-related paranoid ideation." He also observed that while Cynthia had a strong emotional attachment to T.K., her need to continue the relationship was more intense than T.K.'s "need or . . . emotional attachment to the mother." In addition, Dr. Banner believed T.K.'s emotional and developmental issues were exacerbated by providing both biological parents with visitation. Ultimately, Dr. Banner concluded the termination of Cynthia's parental rights would not be detrimental to T.K.

On February 27, 2012, the date for the continued section 366.26 hearing, Cynthia filed a motion to continue and another section 388 petition. The reason for the continuance, according to counsel's declaration, was Dr. Banner's report had not included some recent information, i.e., Cynthia had completed the perinatal program, obtained employment, and arranged for child care in the two months before the continued hearing. Counsel averred this information could alter Dr. Banner's opinion.

As for the section 388 petition, Cynthia declared the fact she had recently secured stable housing and employment, completed the perinatal program and achieved sobriety constituted changed circumstances. In sum, Cynthia believed she now had "the stability required to insure the wellbeing of [T.K.]."

Without specifically denying the motion to continue, the juvenile court conducted a hearing on February 27. Cynthia's counsel cross-examined Dr. Banner. Dr. Banner testified his opinion had been based, in large part, on Cynthia's lack of stability. He acknowledged the positive relationship between mother and child, but recommended termination of parental rights. The court asked Dr. Banner if his opinion would change with information "the mother [has] housing, has completed a perinatal course, has employment, [and] has daycare . . . ." Dr. Banner replied, "each of those items don't sound substantial to me. I mean I would have to know a considerable amount of additional information to feel secure that – that what she can offer outweighs the benefit of adoption of this minor child. This minor child certainly deserves to have a chance at a reasonably good – good life. He's a – it[] seems to me, from what I've evaluated, he already has [been] compromised."

The court continued the hearing, but on March 1, Cynthia's attorney declared a conflict. On April 19, new counsel filed another section 388 petition. Cynthia now claimed six months of sobriety, graduation from the perinatal program and participation in their aftercare program, attendance at 12-step meetings, employment and the opportunity for a stable residence constituted changed circumstances. She also filed a motion for an updated bonding study.

On April 24, at the continued section 366.26 hearing, the court denied Cynthia's section 388 petition without a hearing after finding she failed to make a prima facie case for changed circumstances. As the court characterized Cynthia's efforts in this regard, the petition "show[ed] a possibility of change in circumstances," not changed circumstances.

The court also denied Cynthia's request for an updated bonding study. After reviewing Dr. Banner's testimony and his report, the court concluded, "There is no question that there is a bond between the mother and child of sorts, but it is not the type as it is described by the psychologist of a mother/daughter or mother/son bond. It's

different. It's still a bond but it's not of a parental sort. [¶] And [T.K.] deserves and needs that parental bond with someone who is going to take care of his every need 24 hours a day every day for the rest of his life."

After hearing the arguments of counsel and reviewing the SSA reports submitted, the court summarized the case as follows: "What brought us here on this matter was the fact that the child was born positive toxicology with methamphetamine in his system. The child was taken from the mother at the detention and eventually placed with the paternal grandmother. [¶] On February 4th, 2010, mother and father both plead nolo contendere to the petition, and they were both given a plan. The concept in the plan was for them to complete everything within the plan and the timelines given and potentially to have their child come back into their care; however, that did not occur. [¶] The parents did not meet the timelines. The parents did not comply with the plan. Mother's visits, by March of 23rd, 2010, were reduced to 10 hours per month. And by May of 2010, mother was told to no longer breastfeed the child because she was still continuing to test positive for methamphetamine. [¶] The mother continued to test positive for methamphetamine through either a positive, a dilute, or a missed test as recently as October 3rd, 2011, when she presented a dilute following a missed test in September of 2011. [¶] Mother's family reunification services were terminated in June of 2011 because she failed to progress. [¶] The findings at this stage of the proceeding require that the court make a finding by clear and convincing evidence that the child is likely to be adopted and, number 2, that no exceptions apply. [¶] Furthermore, the court does find at this time by clear and convincing evidence that this child . . . is likely to be adopted. [¶] He is not only generally adoptable, he is cute and healthy, bo[th] mentally and physically. He is also specifically adoptable as he is now currently residing with the pre-adoptive family who has been raising him in their home since August of 2011 and wished to proceed. [¶] The second finding the court must make is whether any exceptions apply, and the mother is asserting that the exception of Welfare and

Institutions Code section 366.26, (c)(1)(B)(1) applies. [¶] Mother asserts that the termination of parental rights would be detrimental to the child due to her assertion that she has maintained regular visitation with the child, and the child would benefit from continuing the relationship, and secondly, there is evidence before the court that this mother did maintain visitation [] between herself and [T.K.]. [¶] We have received into evidence the following facts: That she has had approximately 81 visits with [T.K.] from August 2010 to October 31st, 2011. 37 of them occurred after reunification services were terminated in June of 2011. [¶] The court is also aware that additional visitations have occurred with mother since this proceeding began, and so would also take into consideration the fact that there are even more visitations than 81; however, this child is two years and four months old. [¶] [T.K.] has lived approximately 850 days. Of 850 days, mother has spent 1/10th of them with [T.K.]. 9/10th of those days, he has been alive and has spent them with someone else. [¶] The court finds by clear and convincing evidence that the quantity of visitation does however rise to the level of regular visitation. [¶] The court moves now to the second prong, and that is whether or not the child would benefit from continuing this relationship. [¶] In the case of *In re I.W.*, a 2009 case, 180 Cal.App.4th, 1517, the court was challenged as to a juvenile court's finding that there was no beneficial relationship that amounted to a contention that the undisputed facts lead to only one conclusion. [¶] Unless the undisputed facts established the existence with beneficial parental or sibling relationship is a substantial evidentiary challenged to this component of the juvenile court's determination would not succeed. [¶] The same is not true as to the other component of these adoption exceptions. The other component of both the parental relationship exception and the sibling relationship exception is the requirement that the juvenile court find that the existence of the relationships constitutes a compelling reason for determining that termination would be detrimental. [¶] A juvenile court finding that the relationship is compelling reason for finding detriment to the child is bad on the facts, but it is not primarily a factual issue. It is instead

quintessentially a discretionary decision which calls for the juvenile court to determine the importance of the relationship in terms of the detrimental impact that its severance can be expected to have on the child and to weigh that against the benefit to the child of adoption. [¶] The focus is on the child. [¶] . . . [¶] In sum, mother has presented no evidence that the minor's relationship with her is sufficiently substantial and positive such that the minor would be greatly harmed if the relationship were severed. On the other hand all of the evidence submitted before the court shows that the minor is thriving out of the mother's custody. [¶] The Legislature has, in effect, found the best interests of the minor to be served by permanence and stability afforded by adoption at this stage in the proceedings. [¶] The juvenile court would have to find an exceptional situation existed to forego an adoption. [¶] This court does not find [that] an exceptional situation exists at this time and finds that any benefit of continuing the relationship with mother does not rise to the type of substantial, positive, and emotional attachment that would cause the minor great harm if severed and does not outweigh the benefits of stable and permanent home."

DISCUSSION

Summary Denial of Section 388 Petition

"Under section 388,[3] a parent may petition the court to change, modify, or set aside a previous court order. The petitioning party has the burden of showing, by a preponderance of the evidence, that there is a change of circumstances or new evidence, and the proposed modification is in the minor's best interests. [Citations.]" (*In re S.M.*

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[3] Section 388, subdivision (a) reads, in relevant part: "Any parent or other person having an interest in a child . . . may, upon grounds of change of circumstances or new evidence, petition the court in the same action in which the child was found to be a dependent child of the juvenile court . . . for a hearing to change, modify, or set aside any order of court previously made or to terminate the jurisdiction of the court. The petition shall be verified and . . . shall set forth in concise language any change of circumstance or new evidence that is alleged to require the change of order or termination of jurisdiction."

(2004) 118 Cal.App.4th 1108, 1119.) A petition for modification under section 388 must contain a "concise statement of any change of circumstance or new evidence that requires changing the [prior] order . . . ." (Cal. Rules of Court, rule 5.570(a)(7).)[4] "Such petitions are to be liberally construed in favor of granting a hearing to consider the parent's request. [Citations.]" (*In re Marilyn H.* (1993) 5 Cal.4th 295, 309.) Furthermore, "[t]he parent [seeking modification] need only make a prima facie showing to trigger the right to proceed by way of a full hearing. [Citation.]" (*Id.* at p. 310.)

"There are two parts to the prima facie showing: The parent must demonstrate (1) a genuine change of circumstances or new evidence, and that (2) revoking the previous order would be in the best interests of the children. [Citation.]" (*In re Anthony W.* (2001) 87 Cal.App.4th 246, 250.) "'The prima facie requirement is not met unless the facts alleged, if supported by evidence given credit at the hearing, would sustain a favorable decision on the petition.' [Citations.]" (*In re Brittany K.* (2005) 127 Cal.App.4th 1497, 1505.) We review the juvenile court's determination to deny a section 388 petition without a hearing for an abuse of discretion. (*Ibid.*)

Cynthia argues the juvenile court abused its discretion by summarily denying her section 388 petition. We disagree. Throughout the reunification period, Cynthia's compliance with her case plan was minimal. She had periods of sobriety, but she also had frequent relapses. She repeatedly enrolled in drug treatment programs, only to be terminated for dirty tests or behavior issues. She did eventually complete the

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[4] California Rules of Court, rule 5.570(d) states, "The court may deny the petition ex parte if: [¶] (1) The petition filed under section 388(a) or section 778 fails to state a change of circumstance or new evidence that may require a change of order or termination of jurisdiction or, that the requested modification would promote the best interest of the child. [¶] (2) The petition filed under section 388(b) fails to demonstrate that the requested modification would promote the best interest of the child; or [¶] (3) The petition filed under section 388(c) fails to state facts showing that the parent has failed to visit the child or that the parent has failed to participate regularly and make substantive progress in a court-ordered treatment plan or fails to show that the requested termination of services would promote the best interest of the child."

perinatal treatment program, but that was after reunification services had been terminated. We applaud her efforts at rehabilitation, but they simply came too late in T.K.'s life to make a difference. Cynthia's last section 388 petition reasserted facts contained in previous petitions and offered no assurance that her changing circumstances would coalesce into a stable life suitable for a child. In short, Cynthia has not demonstrated the juvenile court's summary denial of her section 388 petition was arbitrary or capricious.

Section 366.2, subdivision (c)(1)(B)(i) Benefit Exception

Pointing to her frequent, consistent visitation, Cynthia argues the court's finding with respect to section 366.2, subdivision (c)(1)(B)(i) benefit exception. We emphasize that if the court finds by clear and convincing evidence that a child is adoptable, it becomes the parent's burden to show termination of parental rights would be detrimental to the child because a specified statutory exception exists. (*In re Autumn H.* (1994) 27 Cal.App.4th 567, 574.) "In the context of the dependency scheme prescribed by the Legislature, we interpret the 'benefit from continuing the [parent/child] relationship' exception to mean the relationship promotes the well-being of the child to such a degree as to outweigh the well-being the child would gain in a permanent home with new, adoptive parents." (*Id*. at p. 575.) When reviewing whether there is sufficient evidence to support the trial court's finding, the appellate court reviews the evidence in the light most favorable to the trial court's order, giving the prevailing party the benefit of every reasonable inference and resolving all conflicts in support of the order. (*Id*. at p. 576.) Substantial evidence supports the juvenile court's ruling.

Here, Dr. Banner testified Cynthia's bond with T.K. was substantial. However, he did not come to the same conclusion with respect to T.K.'s bond with Cynthia. In fact, the record demonstrates T.K. had behavioral problems after some of his visits with her. Moreover, Cynthia had never cared for T.K. in a parental capacity. At most, she was just another interested adult in his life. Cynthia attempts to parse the

record and rely on those facts which support her position. She recounts her own testimony and that of her parents in this regard. But we do not reweigh the evidence and give deference to the juvenile court's resolution of witness credibility. The court gave credence to Dr. Banner's testimony and SSA reports, and nothing in the record suggests the court's reliance on this evidence was misplaced.

"The reality is that childhood is brief; it does not wait while a parent rehabilitates himself or herself. The nurturing required must be given by someone, at the time the child needs it, not when the parent is ready to give it." (*In re Debra M.* (1987) 189 Cal.App.3d 1032, 1038.) By the time Cynthia made enough progress to even be considered for unmonitored visitation, T.K. had people in his life who were ready, willing, and able to meet his needs as his parents. We are mindful that after a court has terminated reunification services, "the focus shifts to the needs of the child for permanency and stability." (*In re Hashem H.* (1996) 45 Cal.App.4th 1791, 1800.) After nearly two years of family reunification services, Cynthia simply could not meet T.K.'s need for permanency and stability.

The existence of a beneficial relationship is determined, in part, by "[t]he age of the child, the portion of the child's life spent in the parent's custody, the 'positive' or 'negative' effect of interaction between parent and child, and the child's particular needs." (*In re Autumn H., supra*, 27 Cal.App.4th at p. 576.) As the trial court noted, T.K. had lived approximately 850 days by the conclusion of the section 366.26 hearing and for "9/10th of those days, he has been alive and has spent them with someone else." Thus, substantial evidence supports the juvenile court's finding.

Abuse of Discretion-Continuance

Dr. Banner acknowledged his report had been prepared two months before the February 27 hearing. Cynthia's first attorney filed a section 388 petition and motion

to continue[5] the section 366.26 hearing. Cynthia's second attorney requested the court dismiss former counsel's section 388 petition, but there was no mention of the continuance motion. On appeal, Cynthia argues the motion to continue was pending on April 23 when new counsel filed a third section 388 petition. She contends, "it is unclear from the record whether the juvenile court considered the two motions [the section 388 petition and the motion to continue] together, utilizing an analysis pursuant to section 352, or whether the court only considered the motion for an updated bonding study, whereby it only determined whether or not such a report would assist the court." We find no error.

The juvenile court has broad discretion in determining whether to grant a continuance. (*In re Gerald J.* (1991) 1 Cal.App.4th 1180, 1186-1187.) Reversal of an order denying a continuance may be made "only upon a showing of an abuse of discretion." (*Id.* at p. 1187.) Here, the court questioned Dr. Banner and ascertained his opinion would not change *even assuming* the facts Cynthia presented were true. While she had made some progress, it was, as the court noted, "too little too late." "'Section 352 mandates that before the court can grant a continuance it must "give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements."'" (*In re Elizabeth R.* (1995) 35 Cal.App.4th 1774, 1798.) For the juvenile court, T.K.'s need for a stable environment and a resolution of the dependency proceeding outweighed Cynthia's desire to prolong the proceedings. The court's determination was sound and not an abuse of discretion.

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[5] Section 352 governs continuances in juvenile dependency. In pertinent part, section 352, subdivision (a) states, "counsel for the parent, guardian, minor, or petitioner, the court may continue any hearing under this chapter beyond the time limit within which the hearing is otherwise required to be held, provided that no continuance shall be granted that is contrary to the interest of the minor."

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

MOORE, ACTING P. J.

IKOLA, J.